SUPREME COURT, U. S.

FEB 24 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 970

ROBERT E. S. YOUNG,

Petitioner,

vs.

JOHN A. MADER, ERNEST W. WILSON, MAX O. MILLER, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LYMAN BROWNFIELD,
88 East Broad Street,
Columbus, Ohio 43215,
and
THOMAS E. HACKETT,
806 Arcue Building,
Springfield, Chio 45502,
Counsel for Respondents.

ROBERT H. HOFFMAN,
KATHELEEN K. HAASE,
17 South High Street,
Columbus, Ohio 43215,
Counsel for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

	Page
Statement	1
Argument	2
Conclusion	5

CITATIONS

Cases:

Hooper v. Mountain States Securities, 282 F. 2d 195 (5th Cir. 1960)	2
J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964)	3
List v. Fashion Park, Inc., 340 F. 2d 457 (C.A. 2d Cir. 1965)	3
Securities and Exchange Commission v. National Securities, Inc., 37 LW 4101	4
Vine v. Beneficial Finance Co., 374 F. 2d 627 (C.A. 2d Cir.)	2

Miscellaneous:

Fiduciary Suits Under Rule 10 b-5 1968 Duke Bar Journal 791, 793	3
1969 World Almanac, p. 50	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 970

ROBERT E. S. YOUNG,

Petitioner,

vs.

JOHN A. MADER, ERNEST W. WILSON, MAX O. MILLER, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

The statement as made by Petitioner is acceptable to Respondents except that

1) Petitioner and others were sued individually, not in an official capacity; the conduct complained of concerned a merger of Certified Mortgage Corporation (of which Plaintiffs were shareholders) into Certified Credit Corporation, and the individual Defendants were simultaneously officers and directors of both companies (not just of Certified Mortgage); and

2) the printed material which was mailed to shareholders prior to the merger, and to the installment subscribers who continued to pay on their subscriptions after the merger, involved more documents than the proxy statement.

ARGUMENT

Does Section 10 b Confer a Private Right of Action?

Petitioner asks this Court to review (and reverse) the holding below that Section 10 b of the Securities and Exchange Act of 1934 confers a private right of action. The existence of such a right is now accepted generally by the Federal Courts, and does not seem to be judicially questioned in the multitude of cases which Petitioner acknowledges exist in this field.

Certiorari has been denied in several cases involving precisely this point, ranging in time from *Hooper v. Mountain States Securities,* 282 F. 2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961) to *Vine v. Beneficial Finance Co.,* 374 F. 2d 627 (C.A. 2d Cir.), cert. denied, 389 U.S. 970 (1967).

Petitioner expresses concern that over 4½ million persons in corporate management are potential defendants if the rule now generally accepted by the Federally judiciary is allowed to stand.

It may heighten Petitioner's concern to know that there are now more than 24 million stockholders in this country, 1969 *World Almanac,* p. 50, each of whom is a potential plaintiff; and new stockholders are swelling the ranks of the potential plaintiffs daily.

Petitioner suggests that the rights now recognized in 24 million potential plaintiffs should be swept away in order to shield 4½ million "potential defendants" from the consequences of their own conduct. The lessons of economic history are to the contrary. Commercial prosperity and the fabric of society will be served by protecting the investors from over-reaching, not by shielding the insider from responsibility for his actions.

Is Rule 10 b-5 Valid?

Rule 10 b-5 has been involved in each of the 10 b cases to which reference has already been made. Except for the case at hand, neither the litigants nor the courts seem to regard the validity of Rule 10 b-5 as a matter open to serious question.

Is This a Proper Class Action?

In order to dispute the opinion of the Sixth Circuit upholding this as an action for the benefit of a class, Petitioner has had to misconstrue the opinion as it relates to the requirements of materiality and reliance. At page 10 of his Brief he quotes from *List v. Fashion Park, Inc.*, 340 F. 2d 457 (C.A. 2d Cir. 1965) cert. denied, 382 U. S. 811 (1965), and concludes at page 11 that the Sixth Circuit here is in conflict with the Second and other Circuits. However, the Sixth Circuit clearly recognized and followed the rule in *List* (R. 40).

The Petitioner inteprets the Sixth Circuit requirement that Plaintiffs prove they have been "damaged as a result" of Defendants' violation as if such a standard of liability provides investors' "insurance". In truth, however, the requirement of causation is well and generally recognized as being only another way of requiring materiality, and, when coupled with the initial necessity of a violation, is obviously not providing a system of insurance, *Fiduciary Suits Under Rule 10 b-5*, 1968 DUKE BAR JOURNAL 791, 793. Furthermore, on this point there would seem to be no need either to re-inforce or depart from this Court's statement in *J. I. Case Co. v. Borak*, 377 U. S. 426, 431 (1964) with reference to a private action under Section 14 (a) that "the causal relationship of the proxy material and the

merger are questions of fact to be resolved at trial, not here."

Is a Merger a Sale?

As to whether a merger constitutes a sale for the purposes of Section 10 b, we note that this Petition was filed four days before this Court announced its opinion in *Securities and Exchange Commission v. National Securities, Inc.*, 37 LW 4101, where that issue was decided against the position of Petitioner.

POST-MERGER PURCHASES BY PRE-MERGER INSTALLMENT SUBSCRIBERS

As to the treatment in this case of installment subscribers who continued to purchase shares after the merger, the opinion below on this point seems sound, speaks well (if briefly) for itself, and in any event the question presents no issue of importance requiring review of this Court.

On the other hand, the Complaint charges that the Defendants caused Credit (the surviving corporation) to bombard stockholders (by this time all subscribers were stockholders) after the merger with misleading letters and other material for the very purpose of persuading them to keep paying on their subscriptions. Each time a subscriber paid for more stock there was a purchase and sale under federal securities law. Even if a merger were not a sale, the payment on subscriptions after the merger clearly brings the case under 10 b, and the fact that such purchases were encouraged by a fraudulent mail campaign directed alike to every one in the class surely creates a class having the maximum homogeneity.

SUMMARY

Unless this Court decides to wipe out the formidable volume of 10 b litigation pending and anticipated, there is no issue presented here which seems appropriate for review. And while there is no denying the volume and import of 10 b litigation, we view that situation as recognition of an unsatisfied need, rather than a call to protect the apprehended insider from the plaints of the distressed outsider.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

.....

LYMAN BROWNFIELD

.....

THOMAS E. HACKETT